877.

SUPREME COURT OF THE UNITED STATES.

No. 108.

W. & H. MASSINGILL, PLAINTIFFS,

vs.

A. C. DOWNS, CLAIMANT.

ON A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT U. S. FOR THE SOUTHERN DIST. OF MISSISSIPPI.

In the circuit court of the United States, in and for the ninth circuit and southern district of Mississippi, May term, A. D. 1845.

W. & H. MASSINGILL, *Plaintiffs*,
vs.
A. C. DOWNS, *Claimant*.

Trial of the right of property.

On submitting this case to a jury, the plaintiffs shewed, that they had obtained a judgment in this court, on the first Monday of November, 1839, for $3,716\frac{43}{100}$, with interest, &c., against one J. J. Chewning and others, under which judgment and execution had been levied on certain slaves, as the property of the defendant Chewning; whereupon the slaves had been claimed by A. C. Downs, who had made affidavit that they belonged to himself and one Paxton, and had given bond and security for himself, according to law, for the purpose of having a trial of the right of property. On this trial the plaintiffs shewed, that at the time of the levy the property was in possession of the defendant Chewning. The claimant Downs then produced a mortgage of the same property, executed by said Chewning, and regularly recorded, in favor of the Commercial and Railroad Bank of Vicksburg, to shew a title in the bank adverse to the right of the plaintiffs, which mortgage is of date subsequent to that of the judgment. And thereupon, in connection with the rules of this court, as well as the laws enacted by Congress and the State of Mississippi, relative to the force and effect of judgments and executions, the court was requested on part of plaintiffs to charge the jury to disregard such mortgage, because of the paramount right of plaintiffs to have execution of their judgment by means of said property, although no abstract or brief of the judgment had been recorded or

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enrolled in the county where the property was situated. But this charge could not be given nor refused by the court, because the opinions of the judges were opposed thereon. Wherefore, by request of the counsel of both parties, the point upon which the disagreement happened is stated under direction of the judges, and certified under the seal of this court to the Supreme Court, at their next session, for final decision; and with like request this cause is now withdrawn from the jury; and on similar request it is further certified, that the following rules of this court appear on the minutes thereof, adopted at the times respectively prefixed to each rule, as the rules referred to in a previous part of this certificate, namely:

May 9th, 1837.

All judgments and decrees of this court shall constitute a lien upon the real and personal estate of the person or persons against whom such judgment or decree be entered, in the same manner as is now provided by the laws of this State.

November 25th, 1839.

The practice and proceedings in actions at law, by the laws of this State, and the rules of practice for the government of the courts, made by the late Supreme Court, when not incompatible with the laws of the United States, the rules which may be prescribed by the Supreme Court of the United States for the government of this court, or with the existing rules of this court, shall be considered the rules and practice of this court; provided, however, and it is hereby expressly understood, that the rule does not adopt the whole of the act, entitled "An act to amend the laws respecting suits to be brought against endorsers of promissory notes, approved May 13th, 1837; but that all of said act, except the tenth section thereof, is and is intended to be adopted."

Which rules were omitted in the rules of practice for this court, adopted the 14th June, 1842. Ordered and signed accordingly.

P. V. DANIEL, [L. S.]
S. J. GHOLSON. [L. S.]

UNITED STATES OF AMERICA,
Southern district of Mississippi,
Circuit court, United States.

I, William H. Brown, clerk of said circuit court, do hereby certify, that the forgoing is a true copy of the difference of opinion in said case ordered to be certified to the Supreme Court of the United States at May term, A. D. 1845, of said circuit court.

In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of said court, at Jackson, this 17th day of December, A. D. 1845.

W. H. BROWN, *Clerk*.

8/8.

SUPREME COURT OF THE UNITED STATES.

No. 110.

WM. HARDEMAN ET AL.,

vs.

BENJAMIN D. HARRIS.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U. S. FOR MISSISSIPPI.

INDEX.

	Original.	Print.
Bill of complaint - - - - - - - - - -	1	2
Defendant's answer - - - - - - - - -	7	6
Exceptions to answer - - - - - - - - -	9	7
Difference of opinion - - - - - - - - -	9	7
Clerk's certificate - - - - - - - - -	10	8

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UNITED STATES OF AMERICA,
Southern district of Mississippi.
Circuit court, U. S.

WILLIAM HARDEMAN and H. R. W. HILL, vs. BENJAMIN D. HARRIS. } In chancery—suit pending in said court.

(Copy of bill.)

To the honorable the judges of the circuit court of the United States for the southern district of the State of Mississippi, 9th judicial circuit:

Humbly complaining, your orators, William Hardeman, a citizen of the county of Madison, and State aforesaid, and Henry R. W. Hill, a citizen of the State of Louisiana, beg leave to shew the court, that about the year 1834, one James M. Smith, (who has since died in the county of Madison aforesaid,) purchased from one Benjamin D. Harris, now a citizen of the State of Alabama, sundry negro slaves upon a credit, and executed his notes with your orator, William Hardeman and one D. Hardeman, as his sureties, for the amount which was, as your orators now remember, between $12000 and $16000; the said slaves, so sold as aforesaid, were by the said Benjamin D. Harris introduced into the State of Mississippi as merchandize, and for sale, after the first day of May, in the year 1833, and were by him sold after they were introduced to the said James M. Smith, in the State of Mississippi, in direct violation of the constitution and laws of said State; and your orator, William, became the surety of said Smith, at his request, and without receiving any consideration therefor, other than the sale of the slaves as aforesaid to said James M. Smith. Afterwards, about the day of , the said James M. Smith departed this life, having made his last will and testament, and therein appointed his brother, one Cotesworth P. Smith, and one Henry A. Moore, his executors, who proved said will in the county of Madison, and qualified as executors of said will, and took out letters testamentary upon the same. That afterwards, a suit was commenced upon said notes by said Harris, in the circuit court of Madison county, against said executors, Smith and Moore, and your orator, William Hardeman and the said D. Hardeman, and while the said suit was pending said executors, or one of them, paid said Harris a part of said claims; and on the 20th day of January, 1838, executed to said Harris their note, with your orator, William Hardeman, as surety for the balance, say $3,293 $\frac{91}{100}$, payable on the first January thereafter, and said suit in Madison county was dismissed. Said last mentioned note was given in lieu of the original note,

for the purchase money of the slaves aforesaid, and for no other consideration whatever. About the first March, 1839, said Harris instituted [suit] upon this last mentioned note of $3,293 $\frac{91}{100}$, in this honorable court, against said executors, Smith and Moore, and your orator, William Hardeman; and at the May term of this court, and on the 16th day of said May, 1839, said Harris recovered a judgment by default, on said note, against executors, and your orator, Hardeman, for $3,642 $\frac{26}{100}$ *dollars*, besides costs of suit; and an execution issued, to wit, on the 7th March, 1840, from this honorable court, upon said judgment, against said C. P. Smith, Henry A. Moore, and your orator, William Hardeman, and the same was levied upon the property of your orator, Hardeman. Your orator would further shew to your honor, that your orator, William Hardeman, has no recollection that he ever had any notice in fact of the institution of the said suit in this honorable court; the summons which was issued in the cause, as appears by the return of the marshal, was executed by leaving a copy of the writ or summons at the residence of your orator, William Hardeman, which copy never came to the hands or knowledge of your orator, William Hardeman, as he believes and charges, until after judgment by default was obtained against him as aforesaid; for if your orator, William, had known of the pendency of said suit, he would certainly have defended the suit, as he had a good and valid defence in the illegality of the consideration of the note upon which this suit seems to have been commenced. When the deputy marshal came to levy as aforesaid, in 1840, your orator, William, spake to counsel to file a bill in equity to enjoin said judgment and execution on account of the illegality in the consideration of the note, which defence your orator, William, for the reasons before shown, was prevented from making at law; and upon inquiry, he was told that the Hon. S. J. Gholson, judge of this district, was absent from home, and that it was uncertain when he would return, which fact your orators charge to be true; and thus it was impossible for him to obtain an injunction before the levy and sale of his property would have been made. Under these circumstances your orator, William, was at a loss what to do; and at length, after being advised by his counsel, that if he gave a forthcoming bond for the delivery of the property levied on, and forfeited the same, that he would not be precluded from shewing any illegality in the note, or availing himself against the judgment on the bond of any equitable defence which he had against the original judgment; and this your orators charge, if not, the law was understood so to be, by a majority of the members of the bar, and the people of the State of Mississippi generally. Acting under this advice, and being unable to obtain an injunction, for the reason aforesaid, in time to prevent a sale of his property, your orator, William, on the 25th day of April, 1840, executed a forthcoming bond with your orator, Hill, as security therein, for the delivery of the property levied on, on the 4th day of May, 1840, in [the] town of Jackson, which bond was forfeited, and now has the force and effect of a judgment against your orators. Said James M. Smith was, at the time he purchased said negroes, considered one of

the wealthiest men in the county of Madison, and indeed was so considered at the time of his death. Since the rendition of said judgment, said Moore has departed this life, and his estate is reported to be insolvent; and it seems that nothing can be found in the hands of said executors, or either of them, of the effects of their testator, to satisfy this judgment, except a small amount, not more than enough to pay the costs.

At the time your orator, Hardeman, signed this last note as surety as aforesaid, he was assured by said C. P. Smith that the debt should be paid without giving your orator the least trouble about it, saying in substance that your orator should never hear of it again; so your orator, Hardeman, gave himself no trouble or concern about it. At the time your orator, Hardeman, first received information that the judgment by default aforesaid had been taken against him, he was in the State of Tennessee, and he was informed that the execution, which issued on said judgment, had been levied on the property of said C. P. Smith, but that the same did not sell for an amount sufficient to discharge said judgment; said property levied on not selling for more than enough, or little more than enough, to pay the costs of suit. Of these facts, however, your orator, William, was not apprised, until the deputy marshal came to make the levy as aforesaid. Your orator, William, did not return to Mississippi after receiving the information aforesaid of the judgment, until the month of February, 1840; and your orator, William, expected that the judgment aforesaid had been or would have been satisfied out of the property of the said Smith, levied on as aforesaid. Your orator, William, charges the truth to be, that the execution was levied on about three thousand acres of Smith's land, which would have been enough, or more than enough, to pay off the execution, but for some incumbrances discovered on the same, and which prevented its selling; your orator, William, did not know of these incumbrances, and having been informed of a levy on such an amount of property, did believe, and he charges that he had good reason to believe, that the execution would be satisfied without your orator, William, ever being put to any trouble or expense about the matter. By giving the bond aforesaid your orator, William, did not thereby intend to waive any legal or equitable defence which he might have against said note, and he is advised that he is not now precluded by the judgment aforesaid from setting up in equity the objection to said claim, that it is founded on a consideration which renders it absolutely void both in law and equity.

Your orators are advised, that said last mentioned note of $\$3{,}293\ \frac{91}{100}$ dollars, and the judgment aforesaid, and all the proceedings had thereon, are absolutely void and ought so to be declared and decreed by this honorable court; and that said judgment in this court, of the 16th May, 1839, for $\$3{,}642\ \frac{26}{100}$ dollars, as well as all the proceedings upon said execution and forthcoming bond, ought to be perpetually enjoined, and that said note and forthcoming bond ought to be delivered up and cancelled, at any rate so far as your orators are concerned.

Your orators again repeat, that said forthcoming bond was executed

on the 25th day of April, 1840, although it purports to have been executed on the 20th day of that month; but this was an arrangement of the deputy marshall, John F. Cook, who had left the blank bond at the house of your orator, Hardeman, on the 20th April, the same being then dated; and which date was not altered when the bond was afterwards executed by your orators on the 25th of April. Your orator, Hill, being only surety in the bond, gave himself no further trouble about it, relying upon his principal, Hardeman, to do whatever might be necessary to protect their rights in the premises. And forasmuch as your orators are now remediless in the premises by the strict rules of the common law, and only relievable in a court of equity, where matters of this kind are properly cognizable and relievable, they therefore pray, that said Benjamin D. Harris be made defendant to this bill, that he be compelled upon his corporal oath full, true, direct, and perfect answers make to all the allegations in this bill contained, in as full and ample a manner as if the same were here again repeated in the form of interrogatories.

They further pray, that by a decree of this honorable court said promissory note of the 20th of January, 1838, for $3,293 $\frac{91}{100}$ dollars, and the judgment rendered thereon, and execution issued on said judgment, and the forthcoming bond aforesaid, and all the proceedings thereon had, be declared null and void; that the judgment upon said forfeited forthcoming bond be perpetually enjoined, and that said promissory note for $3,293 $\frac{91}{100}$ dollars, and said forthcoming bond, be delivered up and cancelled, so far at least as the same may affect the rights of your orators.

Your orators further pray, that the United States writ of injunction be issued, restraining and enjoining said Harris, his agents, counsellors, attorneys, and all officers and all other persons from any further proceeding in the collection of said debt, and grant to your orators all such other and farther relief in the premises, as the nature of their case may require, and to equity belongs; and that writs of subpœna issue, &c., directed, &c., commanding, &c.; and as in duty bound they will ever pray.

HUBBARD & OTT,
Solicitors for complainants.

SOUTHERN DISTRICT OF MISSISSIPPI, *ss:*

Personally appeared before the undersigned, commissioner of affidavits, &c., in and for said district, Wm. Hardeman, the complainant in the foregoing bill, who made oath that the facts contained in the foregoing bill, so far as derived from his own knowledge, are true; and are true so far as derived from the information of others.

WILL. HARDEMAN.

Sworn to and subscribed before me, this 12th day of Nov., 1840.

GEO. W. MILLER,
U. S. Comm'r.

I do hereby release all errors in the judment at law, prayed to be enjoined by the within bill.

Given under my hand and seal this 12th day of Nov., 1840.

WILL. HARDEMAN.

Copy of answer.

The answer of Benjamin D. Harris to the bill of complaint of William Hardeman and Henry R. W. Hill, exhibited against him in the circuit court of the United States, for the southern district of the State of Mississippi, in the ninth judicial circuit.

This defendant, now and at all times hereafter, saving and reserving to himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is either material or necessary for him to make answer unto, this defendant answering says, that, in the year eighteen hundred and thirty-four he sold negroes to said James M. Smith on a credit, and received in payment therefor the notes or bonds of said James M. Smith, and of the said William Hardeman. On one of said notes, (the third one which became due,) this defendant obtained a judgment against said William Hardeman, in the circuit court of Madison county, in the State of Mississippi, as well as this defendant recollects, and the judgment may also have been recovered against said D. Hardeman, but whether or not, this defendant does not know. Cotesworth P. Smith paid a part of the judgment aforesaid, and for the balance of said judgment, the note or bond on which the judgment in the circuit court of the United States, in the southern district of Mississippi, was recovered, and which is enjoined and described in said complainant's said bill of complaint, was given; and said defendant thereupon acknowledged satisfaction of said judgment, or gave to said Cotesworth P. Smith, aforesaid, one of the executors of said James M. Smith, deceased, a receipt in full. The said note or bond of the said Cotesworth P. Smith, Henry A. Moore, and William Hardeman, was not given for any other consideration than in part satisfaction of the judgment rendered in the circuit court of Madison county, in the State of Mississippi, as aforesaid, and was voluntarily executed, and not at the solicitation of this defendant. This defendant insists, that the defence which the said complainants pretend exists, (if, indeed, it be a defence, which this defendant does not admit,) was one of which the said William Hardeman should have availed himself in a court of law, and not in this honorable court; and defendant therefore demurs to the relief sought by said bill of complaint; and not admitting in said bill contained further than as admitted in this answer, and having fully answered, prays to be dismissed with his costs, &c.

BENJ. D. HARRIS.

881. 7

STATE OF ALABAMA, *Madison county:*

Before me, Benj. T. Moore, United States commissioner for taking affidavits, &c., in and for the northern district of Alabama, this day personally appeared Benjamin D. Harris, the deponent, whose name is subscribed to the foregoing answer, and who is to me personally known, and made oath that the statements contained in the foregoing answer as of his own knowledge are true, and those stated from the information of others, he believes to be true.

BENJ. D. HARRIS.

Subscribed and sworn to before me, this 21st day of May, 1841, at Huntsville, in said northern district.

B. T. MOORE, [L. S.]
U. S. Commissioner.

(Copy of exceptions to answer.)

"In this cause, the complainants, by their solicitors, come and file the following exceptions to the answer of defendant, Benjamin D. Harris, to wit:

1st. The bill charges, that the slaves mentioned in complainant's bill, sold by the defendant Harris to James M. Smith, and which constitute the consideration of the note upon which the judgment at law enjoined in this cause was rendered, were introduced into the State of Mississippi, by the said defendant Harris, for sale, and as merchandize, after the 1st day of May, 18.3. This allegation has not been answered, admitted, or denied.

2nd. It is alleged in the bill, that complainant Hardeman was only surety in the note sued upon at law, and that C. P. Smith, ex'r of Jas. M. Smith, was principal, and that the estate of Jas. M. Smith is insolvent, &c. These allegations are neither answered, admitted, or denied.

Complainant therefore prays, that defendant be required to file a further and sufficient answer, &c.

HUBBARD & OTT, *Solicitors.*"

Be it remembered, that this cause having been submitted to the court on the exceptions taken by the complainants to the answer of the defendants, and the court being divided in opinion, and unable to agree upon the point, whether those exceptions are well taken, and should be sustained or not, it is therefore ordered, that that question be certified for decision to the next term of the Supreme Court of the United States. Which is done accordingly.

Given under our hands and seals, this 18th day of May, 1844.

P. V. DANIEL, [SEAL.]
S. J. GHOLSON. [SEAL.]